Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1143

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellant,

v.

JOHN W. MIKOS, as Property Appraiser of Sarasota County, Florida, and RANDY MILLER, as Executive Director of the Department of Revenue of the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN AND FOR THE SECOND DISTRICT

APPELLEES' MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1143

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS, INC.,

Appellant,

v.

JOHN W. MIKOS, as Property Appraiser
of Sarasota County, Florida, and
RANDY MILLER, as Executive Director
of the Department of Revenue of
the State of Florida,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA IN
AND FOR THE SECOND DISTRICT

APPELLEES' MOTION TO DISMISS

Appellees move, pursuant to Rule 16, § 1(b) and § 1(d) of the Revised Rules of the Supreme Court of the United States, to dismiss the appeal herein upon the grounds that:

(1) The federal questions sought to be reviewed, although Appellees assert the non-existence of any

substantial federal questions, were neither timely nor properly raised, nor expressly passed upon; and the judgment of the Florida court rests upon an adequate non-federal basis;

(2) The appeal does not present a substantial federal question; and

(3) The appeal requests review by the Supreme Court of the United States of questions previously answered by this court in many other decisions.

ARGUMENT

I.

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED, THOUGH APPELLEES ASSERT THE NON-EXISTENCE OF ANY SUBSTANTIAL FEDERAL QUESTIONS, WERE NEITHER TIMELY NOR PROPERLY RAISED, NOR EXPRESSLY PASSED UPON; AND THE JUDGMENT OF THE FLORIDA COURT RESTS UPON AN ADEQUATE NON-FEDERAL BASIS.

While Appellant attempted to challenge the validity of the statute in its complaint,[1] it thereafter failed to preserve this question.

This court's jurisdiction requires:

> [T]hat there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws. *Charleston Fed. Sav. & L. Assoc. v. Alderson,* 324 U.S. 182, at p. 185, 89 L. Ed. 857, at p. 860.

The judgment of the trial court[2] neither struck down nor upheld the validity of any state statute, but

[1] (A. 44a)

[2] (A. 13a)

erroneously carved out its own apportionment formula, suggesting that this was required under the Commerce Clause of the Federal Constitution (Article 1, Section 8). The trial court thus avoided the constitutional challenge, and in effect attempted to write its own taxing statute.

Appellant failed to challenge the validity of the statute in its appeal to the Florida District Court of Appeal. Appellant's Points on Appeal,[3] in all briefs there submitted, merely sought to establish a partial exemption from taxation, by urging an apportionment formula. Even in their cross appeal they did not urge the District Court to declare the statute repugnant to the Federal Constitution either on its face, or as applied.[4]

The District Court of Appeal of Florida, Second District, decided two issues: (1) the interpretation of the phrase "permanently located" as contained in the statute; and, (2) whether the property was taxable at full value.

As to the former, it found, as a matter of fact, that the nature of the property and the purpose of its stay in Sarasota County afforded a tax situs. As to the latter, since the property was not in the stream of commerce on the taxing date, it should be treated as any other movable property, and was taxable at one hundred percent of its value.[5]

The court found it unnecessary to construe the validity of the statute, since it determined that the property was not in interstate commerce on the taxing date.

[3] [Appellees' Appendix (A.A. 1a)]

[4] It is significant that Appellant moved before the Florida Supreme Court that the trial court judgment *did not* construe the validity of any Statute (A.A. 3a).

[5] (A. 1a)

Substantial authority exists for such ruling: *Brown v. Houston,* 114 U.S. 622, 29 L. Ed. 257; *Coe v. Errol,* 116 U.S. 517, 29 L. Ed. 715; *Kelley v. Rhoads,* 188 U.S. 1, 47 L. Ed. 359; *Diamond Match Company v. Village of Ontonagon,* 188 U.S. 82, 47 L. Ed. 394; *Heisler v. Thomas Colliery Co.,* 260 U.S. 245, 67 L. Ed. 237; *Hope Natural Gas Co. v. Hall,* 274 U.S. 284, 71 L. Ed. 1049; *Minnesota v. Blasius,* 290 U.S. 1, 78 L. Ed. 131; *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U.S. 33, 84 L. Ed. 565.

Appellant sought certiorari and appeal to the Florida Supreme Court. Appellant attempted to invoke that court's jurisdiction, claiming that it had continuously raised, and the District Court of Appeal had decided, the validity of the taxing statute.[6] The Florida Supreme Court found none of these assertions to be accurate, and accordingly dismissed the appeal and denied certiorari.[7]

Appellant, in its jurisdictional statement (page 13) suggests that this court has jurisdiction herein because of an apparent conflict between a decision of a California court in the case of *Ice Capades, Inc. v. County of Los Angeles,* 56 Cal. App. 3d 745, 128 Cal. Rptr. 717, and the Florida courts in the within case. The distinctions between the two cases are vivid[8] and there is no

[6](A.A. 3a, *supra*)

[7](A. 16a)

[8]The California court in *Ice Capades* established tax situs liability of the property based on its stay in California and travel around the country, exempting only the limited stay in New Jersey. This was based on a finding that the New Jersey stay was equivalent in purpose and nature to the California stay. Here, there is no other jurisdiction where the stay is for the same purpose and nature equivalent to the stay of Appellant's property in Venice, Florida.

conflict. In any event, this does not afford a basis for this court entertaining jurisdiction.

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant mistakenly suggests that when a state makes an adverse factual determination in applying a tax statute, this automatically creates a Federal question.

The Florida courts were here required, purely as a matter of Florida law, to define the phrase "permanently located" contained in the taxing statute. After clarifying this phrase, the District Court in Florida then applied it to the facts of this case.

This factual determination was based on an analysis of Appellant's circus operations and its property. The courts distinguished such properties from the permanency of real estate, and found that its presence was consistent with continuity, and were not sporadically or temporarily present in the taxing jurisdiction. There is ample support in the record for such factual determination.[9]

The Florida District Court then turned to the apportionment thesis of the trial court. While recognizing the United States Supreme Court doctrine of apportionment in the taxing of instrumentalities, that court found Appellant's property to be in the nature of a commodity.[10]

The court next examined the question of whether Appellant's property was within the stream of interstate

[9](A. 1a, 20a)

[10](A. 1a)

commerce on the January 1 taxing date, and found that it was not.

Numerous U.S. Supreme Court decisions have held that taxation of property shipped interstate, either before its movement begins, *McGoldrick v. Berwind-White Coal Min. Co., supra; Coe v. Errol, supra; Bacon v. Illinois,* 227 U.S. 504, 57 L. Ed. 615; *Heisler v. Thomas Colliery Co., supra; Minnesota v. Blasius, supra;* or after such movement ends, *Brown v. Houston, supra; Pittsburg & S. Cole Co. v. Bates,* 156 U.S. 577, 39 L. Ed. 538, is not forbidden.

This court, in *McGoldrick v. Berwind-White Coal Min. Co., supra,* clarified the balance between national and state power in a footnote:

> "After its supposed recrudescence in Leisy v. Hardin, 135 U.S. 100, 34 L. Ed. 128, 10 S. Ct. 681, 3 Inters. Com. Rep. 36, the opinions of Justice Miller in Woodruff v. Parham, 8 Wall. (U.S.) 123, 19 L. Ed. 382, supra, and of Justice Bradley in Brown v. Houston, 114 U.S. 622, 29 L. Ed. 257, 5 S. Ct. 1091, were explained by Chief Justice (then Justice) White in American Steel & Wire Co. v. Speed, supra (192 U.S. at 521, 48 L. Ed. 546, 24 S. Ct. 365), as the recognition by the court that the question was not whether 'interstate commerce was to be considered as having completely terminated,' but whether a particular exertion of taxing power by a state 'so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress.' He pointed out that the Court in these cases 'conceded that the goods which were taxed had not completely lost their character as interstate commerce since they had not been sold in the original package. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce.'"

Appellant's circus properties, including the railroad cars, were at rest in Sarasota County on the taxing date. Their journey into interstate commerce did not begin until later, when the circus was delivered to the common carrier for transport.[11] The fact that the circus property prior to coming to rest had been in interstate commerce, does not bring it within the application of the Commerce Clause for local taxing purposes.

III.

THE APPEAL REQUESTS REVIEW BY THE SUPREME COURT OF THE UNITED STATES OF QUESTIONS PREVIOUSLY ANSWERED BY THIS COURT IN MANY OTHER DECISIONS.

The due process clause (United States Constitution, Fourteenth Amendment) is not violated by the finding that Appellant's property tax situs was in Sarasota County. The opinion below sets forth the sound basis for such determination.

Appellant mistakenly fails to differentiate between instrumentality and commodity cases, preferring to label all with the title "movable property."

Instrumentality cases require apportionment. *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18, 35 L. Ed. 613; *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 88 L. Ed. 1283; *Braniff Airways, Inc. v.*

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[11] (A. 32a *et seq.*, departure dates for each year involved)

Nebraska, 347 U.S. 590, 98 L. Ed. 967; *Central Railroad Co. of Pennsylvania v. Commonwealth of Pennsylvania,* 370 U.S. 607, 8 L. Ed. 2d 720, *rehearing denied,* 371 U.S. 856, 9 L. Ed. 2d 93. The railroad and other instrumentality cases represent exceptions to, or limitations upon, the general right of the state to tax. Their purpose has been to avoid duplication of taxation by several states.

Commodity cases do not require apportionment. A circus, including all of its business parts, is not an instrumentality, it is a commodity, and is taxable, as are: tires—*Michelin Tire Corp. v. Wages,* 423 U.S. 276, 46 L. Ed. 2d 495, *rehearing denied,* 424 U.S. 935, 47 L. Ed. 2d 344; aviation fuel—*United Airlines v. Mahin,* 410 U.S. 623, 35 L. Ed. 2d 545; motor vehicles—*General Motors Corp. v. Washington,* 377 U.S. 436, 12 L. Ed. 2d 430; mechanical pens—*Scripto v. Carson,* 362 U.S. 207, 4 L. Ed. 2d 660; cattle—*Minnesota v. Blasius, supra;* coal—*Heisler v. Thomas Colliery Co., supra;* timber—*Coe v. Errol, supra; Diamond Match Co. v. Village of Ontonagon, supra;* and sheep—*Kelley v. Rhoads, supra.*

The commerce clause does not bar the imposition of this tax, since there is no discrimination as to interstate commerce, either as to intent or effect. Since the property is out of the stream of interstate commerce, there is no interdicted burden. Commodities may be taxed whether owned by a resident or nonresident. *Bacon v. Illinois, supra.*

It is a specious argument that the tax is a burden on interstate commerce, since every tax has some effect of that nature, but nevertheless has been held to be valid.[12]

[12] *Brown v. Houston, supra; Northwest Airlines v. Minnesota, supra; McGoldrick v. Berwind-White Coal Min. Co., supra; Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L. Ed. 823, 826.

The District Court of Appeal, Second District, held that Appellant's property was not an instrumentality of interstate commerce. The facts support that finding.

Where, as here, a decision rests on an independent and adequate non-federal basis, the Supreme Court will decline to note jurisdiction.

In point is *General Motors Corp. v. Washington, supra,* where the court, in discussing the burden on the taxpayer in proving exemption from state taxation by reason of the interstate nature of its business, quoted approvingly from *Norton Co. v. Department of Revenue,* 340 U.S. 534, 537, 95 L. Ed. 517, 521, and said:

> And, as we also said in that case this burden is not met "by showing a fair difference of opinion which as an original matter might be decided differently. This corporation, by submitting itself to the taxing power . . . [of the state], likewise submitted itself to its judicial power to construe and apply its taxing statute insofar as it keeps within constitutional bounds. Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, *but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence.*" [Emphasis added.] 377 U.S. at p. 441, 12 L. Ed. 2d at p. 435.

See also: *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 53 L. Ed. 2d 965; *Wilson v. Loews, Inc.,* 355 U.S. 597, 2 L. Ed. 2d 519.

CONCLUSION

The Motion to Dismiss the appeal should be granted. Should the court act upon the jurisdictional statement as a petition for a writ of certiorari, the same should be denied.

Respectfully submitted,

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February 23, 1980

APPENDIX

IN THE
SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

Appeal No. 78-316

JOHN W. MIKOS, etc., et al.,
Appellants,

v.

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS, INC., etc.,
Appellee,

BRIEF OF APPELLEE

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POINT ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT RINGLING'S TOUR AND RAILROAD PROPERTY MAY NOT BE TAXED BY SARASOTA COUNTY, AS IF IT WERE PERMANENTLY LOCATED IN SARASOTA COUNTY.

(A) Whether Ringling's Tour and Railroad Property may only be taxed on a fair, apportioned basis.

(B) Whether Sarasota County has the power to tax Ringling's Tour and Railroad Property on a fair, apportioned basis despite a lack of specific statutory authorization for apportionment.

(C) Whether this case involves the taxation of commodities or moveable property.

POINT II

WHETHER EVIDENCE RELATING TO PAYMENT OF TAXES BY RINGLING TO OTHER STATES SHOULD HAVE BEEN EXCLUDED BY THE CIRCUIT COURT.

POINTS ON CROSS-APPEAL

WHETHER RINGLING'S TOUR AND FAILROAD PROPERTY IS TAXABLE BY SARASOTA COUNTY SINCE IT WAS NOT "PERMANENTLY LOCATED" THERE ON THE ASSESSMENT DATE (RAISED BY RINGLING'S CROSS-ASSIGNMENT OF ERROR, R.1290).

IN THE
SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

Appeal No. 78-316

JOHN W. MIKOS, etc., et al.,
Appellants,

v.

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS, INC., etc.,
Appellee.

REPLY BRIEF OF APPELLEE ON CROSS-APPEAL

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POINTS ON APPEAL

WHETHER, UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, SARASOTA COUNTY MUST REFRAIN FROM TAXING RINGLING'S TOUR AND RAILROAD PROPERTY UNLESS THE TAX IMPOSED IS IN PROPORTION TO THE OPPORTUNITIES, BENEFITS AND PROTECTION SARASOTA COUNTY CONFERRED UPON THE PROPERTY.

IN THE
SUPREME COURT OF FLORIDA

Case No. 56-661

RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., etc.,
Appellant/Petitioner,

v.

JOHN W. MIKOS, etc., et al.,
Appellees/Respondents.

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POINT I

RINGLING IS ENTITLED TO A DIRECT APPEAL PURSUANT TO ARTICLE V, SECTION 3 OF THE FLORIDA CONSTITUTION.

[Page 8]

A. RINGLING EXPLICITLY RAISED THE ISSUE OF THE VALIDITY OF SECTIONS 192.011 AND 192.032(2) OF THE FLORIDA STATUTES.

[Page 10]

B. THIS COURT HAS HELD THAT THE CIRCUIT COURT NEITHER PASSED ON THE VALIDITY OF SECTIONS 192.011 AND 192.032(2) NOR CONSTRUED THE CONSTITUTION.

[Page 11]

C. THE DISTRICT COURT PASSED UPON THE VALIDITY OF SECTIONS 192.011 AND 192.032(2) AND EXPRESSLY CONSTRUED THE CONSTITUTION.

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POINT II

THIS COURT SHOULD GRANT CERTIORARI SINCE THE DECISION OF THE DISTRICT COURT AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS.